89-1034

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LOU C. GOLDSTEIN,
Petitioner - PRO SE,

V.

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

LOU C. GOLDSTEIN
249 South Colonial Homes Circle, N.W.
Atlanta, Georgia 30309
(404) 355-0539

PETITIONER
PRO SE

QUESTION PRESENTED

1. Whether the Court of Appeals erroneously ruled on the substantive law under §510 ERISA by sustaining credence to Respondents proffered reason for discharge of employment (pretext of poor dependability) in holding there is no merit to any of Petitioner's arguments, where the district court ruling complained of was upon questions of fact within statutory definition and questions of law which substantially affect the substantive rights of Petitioner in federally regulated employee benefit plan, in action for interference with statutory rights under statute prohibiting such interference, as to which the courts of appeal are in conflict?

PARTIES

Petitioner, Lou C. Goldstein, was employed by Delta Air Lines, Inc., as a flight attendant commencing on or about October 10, 1966, and continued in such employment until on or about March 16, 1981, when Delta terminated her employment.

Respondent, Delta Air Lines, Inc., is a corporation which is engaged in the commercial airline business operating both domestically and internationally.

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MISCELLANEOUS:

Protection of Employee Benefit Rights

Delta Family Care Disability and Survivorship Plan

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Protection of Employee Benefit Rights

Delta Family Care Disability and Survivorship Plan

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LOU C. GOLDSTEIN,
Petitioner - PRO SE,
V.
DELTA AIR LINES, INC.,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATED SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not reported. It is reproduced in Appendix A.

The decision of the district court was not reported. It is reproduced in Appendix D.

JURISDICTION

The decision of the Court of Appeals was entered on June 6, 1989. The petitions for rehearing were denied August 31, 1989.

This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254.

FEDERAL STATUTES INVOLVED

The federal statute involved is The Employment Retirement Income Security Act of 1974 (ERISA), Public Law 93-406, 29 U.S.C. §1140.

A copy of the relevant portion is included in Appendix F.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under the Employee Retirement Income Security Act, 29 U.S.C., 93rd Congress, H.R. 2, Public Law 93-406, (Hereinafter referred to as ERISA).

Lou C. Goldstein, hereinafter referred to as "Petitioner" was employed as a flight attendant by Delta Air Lines, Inc. commencing on October 10, 1966, and continued in such employment until March 16, 1981, when Delta terminated her employment for exercising her rights under ERISA.

Delta Air Lines, Inc., hereinafter referred to as "Respondent", is a corporation which is engaged in the commercial airline business operating both domestically and internationally.

As an employee, Petitioner was entitled to certain benefits provided by Respondent, among which are Delta Family Care Medical Plan, Delta Family Care Disability and Survivorship Plan and Delta Family Care Retirement Plan, hereinafter referred to as "the Plan", all of which are subject to ERISA.

Petitioner had rights and expectations of rights under these Plans and was entitled to sick leave, short and long term disability, pension and retirement benefits as set out in the various Plans.

At such time Petitioner was also eligible to receive short and long term disability benefits under the Plan and Retirement benefits under the Plan. Petitioner was also eligible for sick leave in accordance with Respondent's sick leave policy. All of these Plans are protected by ERISA.

Delta's Family Care Disability and Survivorship Plans, long term and short term, work as follows: An employee who

is too ill to work is given a certain number of sick leave days during the year. Once these sick leave days are used up, the employee must apply for short term disability benefits. In order to qualify for short term disability benefits, an employee must be unable to perform his customary occupation. In order to obtain short term disability benefits, the employee must provide a medical certificate indicating that he or she is incapable of performing his or her normal work duties. These short term benefits are generous, but of fixed duration. Short term disability benefits are paid for a period of 26 weeks, including the time an employee received full pay sick leave. As long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status. Once all of an employee's short term disability leave has been used up, the employee must either return to work or apply for long term disability benefits. In order to obtain long term disability benefits, the employee must provide medical certification proving that he or she is incapable of performing <u>any</u> job. Eligibility for benefits under the Disability and Survivorship Plan is independent from the employment status of the employee. Thus, as long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status.

Delta's Sick Leave of Absence Policy provides for leave without pay for 90 days after benefit denial.

> "Effective June 1, 1981, the early retirement age under the Plan was changed from age 55 to age 52. In addition, the Plan implemented a special program

allowing employees to retire at age 50 (however, benefits would not be payable until age 52) if they had 25 years of service at age 50." (Affidavit of Harvey King, R.1, 21.)

"Eligibility for benefits under the Disability and Survivorship Plan is independent from the employment status of the employee. Thus, as long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status" (Affidavit of Katherine Dodson, R.1, 21.)

"Plaintiff's employment with Delta was terminated as a result of her failure to maintain acceptable dependability" (Affidavit of John Hume, R.1, 21).

Petitioner alleged in her complaint that Respondent concealed the unlawful termination from her.

On October 26, 1980, Petitioner filed for full pay sick leave. This illness resulted in termination of employment by Respondent on March 16, 1981. Petitioner's sick leave expired on January 3, 1981. She was removed from the payroll January 4, 1981. "Flight Attendant Sick Leave" forms must be completed and submitted to supervisor immediately upon return to work; the Plan handbook states "Claims for disability should be submitted within 31 days after being removed from the payroll". In a letter dated January 22, 1981, Respondent specifically informed Petitioner that failure to submit medical certification would result in termination of

Petitioner's employment (Ex: D,E,F,G; R1.23 -pp. 3,4; Ex. L: R 1.21).

On February 12, 1981, John Hume, Vice President-In-Flight Service, advised the Manager of In-Flight Service that Respondent was considering three alternatives regarding Petitioner's status:

1. Terminating her employment before returning to work;

2. Allowing her to return to work, placing her on indefinite suspension, reviewing her record and terminating her employment.

3. Allowing her to return to work with a strong final warning.

Hume assured Petitioner that Respondent's only concern was to make certain that she was well enough to return to work as a productive employee (Ex. M; R1.21).

In order to qualify for short term disability benefits, an employee must be unable to perform his customary occupation. (Affidavit of Katherine Dodson, R1.21, hereinafter referred to as the "Dodson Affidavit").

Petitioner submitted additional medical certification to Respondent from her attending physician, as noted in Dr. Frank's certification of February 19, 1981. Respondent insisted that Petitioner see Dr. Dennis, a physician on behalf of Delta (R1.23, pp. 4,5).

A decision was made on February 24, 1981, to terminate Petitioner's employment. Respondent stated reason was "poor dependability". Delta's personnel policy requires that such termination recommendation be reviewed by various management personnel and final approval for the termination

was received on March 13, (Hume Affidavit R1.21). On March 16, 1981, petitioner's employment was terminated. The termination of employment was made effective January 4 - this was a bookkeeping entry - it is Respondent's policy to back date employment terminations (R1.21, p.24; Ex. H R1.23, p. 4).

In a letter dated March 11, 1981, to Petitioner, Respondent specifically informed Petitioner that all short term benefits would be stopped and payments halted retroactively as of February 19, 1981, the date of her first scheduled appointment, rather than February 27, the date she actually saw Dr. Dennis (R1.23 p.4).

As long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status (Dodson Affidavit, Ex. ; R1.21).

Petitioner's claim for short term disability was initially granted for the period January 4 through February 20, 1981, but denied thereafter on the basis that the medical evidence in the file did not support her claim that she was unable to perform her customary work. Petitioner complied with the provisions under the Plan, she was eligible for benefits, she qualified for benefits. The evidence was in the file or the claim would not have been granted. Short term disability benefits are paid for a period of 26 weeks, including the time an employee receives full pay sick leave (Dodson Affidavit, R1.21).

Petitioner was entitled to leave without pay for 90 days after benefit denial, under Respondent's sick leave of absence policy (R1.23, p. 5). It is Respondent's practice in some

circumstances to set a date certain by which an employee who has been denied long or short term disability must return to work so that there can be no question but that if the employee does not return to work by that deadline, he or she will be deemed to have have abandoned the job. There is no policy or practice which requires Respondent to make such a decision at any particular time. (R1.24, pp 2,3).

Respondent could not continue to consider her employable (Hume Affidavit, R1.21).

Petitioner felt she had been misinformed and misled and felt confused (attached to Hum Affidavit, Ex. N: R1.21).

The following references to the record are all excerps from Respondent's Motion For Summary Judgment (all documents are attached to the affidavit of John Hume and the affidavit of Katherine Dodson R1.21):

Following the expiration of Petitioner's 26 week short term disability period on May 7, 1979, the Plan notified her on July 18, 1979, that based upon Dr. Whaley's medical examination, it did not appear that she was eligible for long term disability benefits.

Whaley's Letter to Respondent dated May 14, 1979, in pertinent part:

I saw no need to accomplish any x-rays or laboratory evaluation.

If any further information about her comes to your attention that might alter the above opinion, I would appreciate your bringing it to me and a supplemented medical report could be issued.

On July 27, 1979, Petitioner was notified by Respondent's Personnel Department to contact her local manager regarding returning to work (Hume Affidavit). The 90 day period referenced in Respondent's letter of July 26 begins on July 18 (the date of the disability denial) and refers to the period in which the employee must notify Respondent in order to retain employment (Ex. H). Petitioner kept Respondent apprised of her disability status (Ex. G,I). Respondent informed Petitioner it would be necessary to submit medical certification prior to return to active status (Ex. H). "<u>. . . On October 24, 1979, based upon her poor dependability and her failure to return to work, her employment was terminated</u>" (Hume Affidavit) Petitioner was reinstated. <u>Respondent was aware that petitioner's benefit status was pending further review between May and November 1979</u> (Ex. K).

Based on Petitioner's benefit appeal of October 22, 1979, Petitioner was notified on November 9 of her eligibility for short term disability and found eligible for all short term disability benefits through May 7, 1979 (Ex. K), effective retroactively.

In a letter dated January 28, 1980, Respondent specifically advised Petitioner that she had been on an unauthorized leave since May 7, 1979 (Ex. J), Petitioner had been appealing the denial of benefit claims through the Plan's appeal procedure.

Petitioner apprised Respondent that the disability claim forms were being processed by her physician. The long term disability claim was denied April 2, 1980, Delta's process began again. (Motion for Reconsideration/Amendment to Motion for Reconsideration, R1 and R2; 2nd Supplementatl

Record on Appeal). At no time was Petitioner offered a ground job. Petitioner did not admit dependability prompted loss of her job. (It was dictated to Petitioner by Respondent.)

Petitioner maintains her position: She did not have proper discovery; Respondent has engaged in concealment regarding her; her Motion For Reconsideration and amendment have merit; her evidence to show prior acts of Respondent, evidence a particular "design" "purpose" which is of legitimate probative value.

Effective June 1, 1981, the early retirement age under the Plan was changed from age 55 to age 52. In addition, the Plan implemented a special program allowing employees to retire at age 50 (however, benefits would not be payable until age 52) if they had 25 years of service at age 50.

The *District Court* found it was obvious that Respondent fired Petitioner because she was an undependable employee, Petitioner had provided no evidence to the contrary, that Petitioner completely failed to demonstrate any merit to her claim.

The *District Court* found that Petitioner complied under the provisions of the Plan, Petioner qualified for benefits under the provisions of the Plan, and that Petitioner's claim for short term disability was granted. Then, the District Court found Petitioner was not eligible. The reason for halting the claim and stopping the benefits is in dispute.

Petitioner's claim was granted. The evidence was in the file. Petitioner submitted additional certification (Ex. I: R1.23-4). Respondent insisted Petitioner see Dr. Dennis who reported no disability. (R1.23, pp 4,5) Respondent maintains that Petitioner's that Petitioner's status is because the medical

evidence in file did not support Petitioner's claim that she was unable to perform her customary job (Dodson Affidavit, R1.21). On February 20, 1981, (the date Petitioner's benefit claim was halted), Respondent also maintains that Delta would have to llok at Petitioner's dependability record then terminated Petitioner's employment for poor dependability.

The District Court held that it is obvious that Delta retroactively decided to make February 19 the cut-off date for short term disability benefits for administrative reasons. The District Court in fact stated that "Given ms. Goldstein was not eligible for short term disability, Delta (Respondent) could just as easily have cut off her disability benefits on January 4, 1981, the day her sick leave expired."

The *District Court* found that Respondent "generally" allows an employee who has been denied disability, 90 days within which to return to work before deeming the position abandoned. The Court's decision is attached hereto as D-1.

The *Court of Appeals* sustained credence to Respondent's pretext for termination by holding the undisputed facts show she was terminated because she was an undependable employee, there is no merit to any of her arguments. The Court of Appeals ruling is attached hereto as A-3.

Petitioner filed Motion for Rehearing and Rehearing In Banc, attached hereto as Appendix B.

REASONS FOR GRANTING THE WRIT

To Insure The Integrity Of The Legislative Intent of ERISA, Employee Benefit Rights Must Be Protected

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans", *Shaw vs. Delta Air Lines, Inc.* 463 U.S. 85,90 (1983), and "to protect contractually defined benefits, " *Massachusetts Mutual Life Insurance Co. v. Russell* 473 U.S., at 148.

To insure the integrity of employee benefit rights, Congress has enacted the Employee Retirement Income Security Act (ERISA) and has prohibited interference with protected rights under the provisions of employee benefit plans, every employee has the right to be free from interference. This means that she cannot be discharged, fined, suspended, expelled or otherwise interfered with in order to prevent her from receiving benefits or attaining eligibility for benefits. See Legislative History of the Employee retirement Income Security Act of 1974, 93rd Cong.

The effect of the *Court of Appeals* holding in this case - the undisputed facts, evidence, shows Petioner was an undependable employee, that Respondent fired her for that reason, there is no merit to her arguments - fails to apply the Legislative Intent.

These important questions of federal law should be settled by this Court to protect and promote the interests of employees and their beneficiaries in employee benefit plans. an exercise of this Court's power is called upon.any analysis of these issues must begin with an understanding of the nature

of the claims asserted by the Petitioner and the purpose of the statute under which these claims are brought. As noted, this case concerns Respondent's termination of Petitioner's employment under the pretect of poor dependability for exercising her rights to which she was entitled under the provisions of the employee benefit plans and for the purpose of interfering with the attainment of rights to which she was entitled or may become entitled; *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd. Cir. 1987).

Section 510 of ERISA provides, in pertinent part:

Interference with protected rights.

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ... *29 U.S.C.§1140.*

It is, of course, true that the employee in a Section 510 suit needs to establish that at the time of the alleged violation, he or she had the potential of receiving benefits. Otherwise there can be no credible cclaim that the employer's discharge or harassment decision was motivated by a desire to prevent the employee from receiving his or her due. *Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889 (3rd Cir. 1986).

An employee who is too ill to work is given a certain number of sick leave days during the year. petitioner was too ill to work beginning October 26, 1980. Once these sick leave days are used up, the employee must apply for short term disability benefits. in order to obtain short term disability

benefits, the employee must provide a medical certificate indicating that he or she is incapable of performing his or her work duties. In order to qualify for short term disability benefits, an employee must be unable to perform his customary occupation. petitioner filed such certification from her treating physician, Dr. Frank.

These short term benefits are generous, but of fixed furation. Short-term disability benefits are paid for a period of 26 weeks, including the time an employee receives full pay sick leave. Petitioner's short term disability claim was granted. As long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability, regardless of the employee's employment status.

Respondent interfered with Petitioner's rights under the ERISA protected Plan. The claim was halted (denied) and payments stopped on February 20, 1981. Respondent terminated Petitioner's employment under the pretext of poor dependability. Plan benefits, as provided, did not continue for Petitioner.

Congress enacted §510 primarily to prevent unscrupulous employers from discharging or harrassing their employee in order to deprive them of their substantive rights. Section 510, unlike other anti-discrimination provisions, is designed to prevent injury to employee's protected rights not simply to redress the injury after the goals of a discriminatory plan have been effected, *Gavalik v. Continental Can Co.*, 812 F 2d 834 (3rd Cir. 1987).

The Court held that the claim was initially granted, but payments were halted after Petitioner was examined by

another physician on behalf of Delta, Dr. Dennis, who concluded that there was no reason why Plaintiff could not return to her customary job. The fallacy with this position is that the Court failed to consider that udner the Plan, as long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status. in the instant case, payments were halted and the claim was denied on the basis that medical evidence was not in the file. The Court failed to consider that Petitioner would not have qualifed under the Plan absent the medical evidence.

> "The Court has little trouble determining that the Administrative Committee that administers Delta's Plan has sufficiently broad discretionary powers to trigger the application of the arbitrary and capricious standard to decisions made by it".

The Court misapplied the provisions of the Plan. The Court found that . . ."Given that Ms. Goldstein (Petitioner) was not eligible for any short term disability, Delta (Respondent) could just as easily have cut off her disability benefits as of January 4, 1981, the day her sick leave expired. This is clearly erroneous. The *District Court's* decision is in direct conflict with the Third Circuit. The *Gavlik Court* held that "because the district court construed §510 as requiring actual deprivation of rights, it failed to consider properly the inchoate components of the liability avoidance scheme that, though producing no immediate or tangible effects on appellants' rights, nevertheless constituted deliberate steps undertaken for the purpose of interfering with appellants' attainment of pension eligibility. When so understood, it is

clear that the district court's own finding are evincive of appellants' satisfaction of their burden to establish by a preponderance of the evidence that the plan was infested with discriminatory intent sufficient to constitute a violation of ERISA."

Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure; it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs the materiality determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. *Anderson v. Liberty Lobby, Inc.*, 91 L.Ed.2d. 202.

The courts failed to consider that Respondent did not carry his burden by showing the absence of evidence. Respondent informed the District Court in the Motion for Summary Judgement that Delta did not support its Motion with depositions, interrogatories or admissions on file. What Delta alleged as admissions on file were alleged admissions in Delta's files which had not been produced to Plaintiff. These were not admissions on file with the Court, nor did Delta produce affirmative evidence. Delta stated in their Motion "At her deposition, Plaintiff could not point to any facts to support her claim." R-1-21-24. A conclusory assertion that Plaintiff has no evidence is insufficient. Under Rule 56 (c) Delta's Motion for Summary Judgment was not proper.

The party opposing the motion for summary judgment bears the burden of responding only after the moving party has

met its burden of coming forward with proof of the absence of any genuine issue of material fact.

The burden of establishing the nonexistence of a 'genuine issue' is on the party moving for summary judgment. This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party, and an ultimate burden of persuasion, which always remains on the moving party. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the court finds that the moving party has discharged its initial burden of production.

If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgement may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party - who will bear the burden of persuasion at trial - has no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must

confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence int he record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however,s the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged its initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion.

Respondent's proffered reason for termination is a pretext. mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that ERISA, in the instant case, are designed to protect. The evidence on which the Court of Appeals relied has no relevance to the alleged ERISA violation. *Matsushita v. Zenith Radio Corp., 475, US 574 89 L.Ed.2d 538 106 S. Ct. 1348.*

Burden of persuasion on plaintiff employees in action alleging violation of Employee Retirement Income Security Act section proscribing interference with protected rights did not require employees to prove that "but for" employer's consideration of employees' impending pension eligibility, employees would have remained at work, but rather, required only proof that "but for" the impermissible consideration,

employees would of have lost work. *Employee Retirement Income Security Act of 1974, §510, 29 U.S.C.A. §1140.*

The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987).

To recover under §510, a plaintiff need not prove that "the *sole* reason for his (or her) termination was to interfere with pension rights" *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987).

The Trial Courts findings of fact are governed by the clearly erroneous standard of review "but as to the legal component of the conclusion, this Court has plenary review." *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987).

CONCLUSION

Employers must recognize their legal duty under ERISA. Employment decisions must be undertaken subject to entitled rights protected under ERISA. Courts must apply the legislating intent. In order to secure the rights and expectations brought into being by the Landmark Reform Legislation of ERISA, it is respectfully submitted that a writ of certiorari be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

LOU C. GOLDSTEIN
249 South Colonial Homes Circle, N.W.
Atlanta, Georgia 30309
(404) 355-0539

PETITIONER
PRO SE

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APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8951
No. 88-8138
Non-Argument Calendar

D.C. Docket No. 87-8

LOU C. GOLDSTEIN,

Plaintiff-Appellant,

versus

DELTA AIRLINES, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

(June 6, 1989)

Before RONEY, Chief Judge, TJOFLAT and JOHNSON, Circuit Judges.

PER CURIAM:

Plaintiff Lou C. Goldstein appeals a summary judgment for defendant Delta Airlines, Inc.. and the denial of a motion for reconsideration in Goldstein's action pursuant to the Employee Retirement Income Security Act (ERISA). Goldstein, a former Delta flight attendant, contends that the district court erred in granting a summary judgment and improperly restricting her discovery efforts. We affirm.

This action is pursuant to the ERISA provisions in 29 U.S.C.A. §§ 1140 and 1141. Section 1140 prohibits, interalia, discharging and employee for either exercising her rights under an employee benefits plan or for the purpose of interfering with her attainment of any rights under the plan. To establish a cause of action under ERISA for wrongful termination, the discharged employee must show that the employer intended to deprive the employee of ERISA benefits and that this intent was a motivating factor in the termination. See Gavalik v. Continental Can Co., 812 F.2d 834, 851-52 (ed Cir.), cert. denied, ____ U.S. _____, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

Since the undisputed facts show that Goldstein was terminated because she was an undependable employee, there is no merit to any of her arguments. it is not necessary to detail all the facts, which are meticulously set forth in the district court's order and of which the parties are aware.

Goldstein worked for Delta from October 1966 until it fired her in March 1981. She missed 29 days of work in 1970, 43 in 1971, 99 in 1972, and 100 in 1975. Delta suspended her for one month in 1974 and 18 months in 1977 through 1978, for exceeding flight attendant weight limits. At the time of her discharge in 1981, she had worked just three months out of the prior four years. She attributed her absences to chronic flu-like symptoms with upper respiratory congestion. After she was fired in 1979, Delta granted her request for reinstatement on the condition that she apply for long-term disability benefits. She did not receive the disability benefits because a Delta physician examined her and determined that she was able to work. Prior to terminating her employment in 1981, Delta offered to transfer her to a job on the ground. She declined. Her discharge at age 34 was approximately three months before the effective date of a change in the pension plan to allow Delta employees early retirement benefits at age 52, rather than at 55 as previously allowed. After her termination, Goldstein requested reinstatement and admitted that her lack of dependability had caused the loss of her job.

Viewed in a light most favorable to Goldstein, as must be done on summary judgment reviews, the evidence shows that Goldstein was an undependable employee and that Delta fired her for that reason and not because she exercised her rights under the employee benefits plan, or because Delta wanted to prevent the vesting of the new early retirement benefits. Summary judgment was proper since there was no genuine issue of material fact and Delta was entitled to judgment as a matter of law. See Sweat v. Miller Brewing Co., 708 F.2d 655, 656 (11th Cir. 1983).

The district court correctly held that Goldstein had no claim under 29 U.S.C.A. §1141, because only the United States Attorney General may enforce this provision. See West v. Butler, 621 F.2d 140, 243-44 (6th Cir. 1980); Phillips v. Amoco Oil Co., 614 F.Supp. 694, 724 (N.D. Ala. 1985), aff'd, 799 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987).

Goldstein's claim that the district court erred in limiting discovery also lacks merit. The court entered a protective order preventing Goldstein from deposing Ronald Allen, Delta's Board Chairman. The record shows that Allen did not make the decision to fire Goldstein, he had no independent recollection of the events in question, and the information sought from him was available from the supervisor who fired Goldstein. The district court has broad discretion in discovery matters, see Harden v. Adams, 760 F.2d 1158, 1167 (11th Cir.), cert. denied, 474 U.S. 1007, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), and Fed. R.Civ. P. 26(c) authorizes it to grant protective orders when warranted.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8951
No. 88-8138

LOU C. GOLDSTEIN,

Plaintiff-Appellant,

versus

DELTA AIRLINES, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT and JOHNSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on hearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion (s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8951 & 88-8138
Non-Argument Calendar

D.C. Docket No. 87-8

LOU C. GOLDSTEIN,
Plaintiff-Appellant,

versus

DELTA AIRLINES, INC.,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT and JOHNSON, Circuit Judges.

PER CURIAM:

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgments of the said District Court in these causes be and the same are hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 6, 1989
For the Court: Miguel J. Cortez, Clerk
By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: September 8, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LOU C. GOLDSTEIN	:	
vs.	:	CIVIL NO. C87-8
DELTA AIRLINES, INC.	:	

ORDER

This action seeking damages and reinstatement under the Employee Retirement Income Security Act (ERISA) is before the court on Defendant's motion for summary judgment. Plaintiff, a former flight attendant with Delta Airlines, claims that she was fired as a pretext in order to deprive her from receiving benefits under Delta's Family Care disability and Survivorship Plan and the company's Family Care Retirement Plan.

Plaintiff was a flight attendant with Delta from October, 1966 through March 20, 1981. Her performance record was poor. According to the employee evaluations attached to Defendant's motion, Plaintiff experienced chronic problems controlling her weight within acceptable standards for flight attendants, and also had a very poor attendance record. [1]

[1] For example, in 1970, she was absent 29 days and removed from the payroll twice. In 1971, she was out 43 days. In 1972, she was out 99 days. In 1973, when her attendance record improved, she was cited for substandard work performance and a poor working attitude. In 1974, she was suspended for failure to conform to her weight restrictions. In 1975, she missed 100 days. In 1977, she was again placed on weight suspension. Her employment file contains numerous warnings regarding her attendance record and weight problems.

While a portion of Plaintiff's absences were explained by her ability to take advantage of Delta's generous vacation benefits and sick leave program, she was frequently absent due to health problems. Her maladies ranged from depression to a chronic problem with an illness of unexplained origin, which produced cold-like symptoms, and plagued Plaintiff for over five years.

Delta's Family Care Disability and Survivorship Plans, long term and short term, work as follows. An employee who is too ill to work is given a certain number of sick leave days during the year. Once these sick leave days are used up, the employee must apply for short term disability benefits. In order to obtain short term disability benefits, the employee must provide a medical certificate indicating that he or she is incapable of performing his or her normal work duties. These short term benefits are generous, but of fixed duration. Once all of an employee's short term disability leave has been used up, the employee must either return to work or apply for long term disability benefits. In order to obtain long term disability benefits, the employee must provide medical certification proving that he or she is incapable of performing <u>any</u> job.

Plaintiff was on short term disability several times during her career with Delta. The prolonged absence which culminated in her termination began in November of 1978. She began taking sick leave at that time, and exhausted her full-pay sick leave on January 15, 1979.

Plaintiff then filed a claim for short term disability benefits. Her application was initially denied, however, this denial was reversed by the administrative subcommittee set up to review these requests pursuant to §503 of ERISA, 29 U.S.C. §1133.

She exhausted this period of short term disability benefits on May 7, 1979. At that point, she was examined by a Dr. Whaley on behalf of Delta. He determined that Plaintiff was capable of performing some occupation. Delta therefore informed Plaintiff on July 18, 1979 that it did not appear that she was eligible for long term disability benefits, although at that time she had not formally filed such a claim.

Delta generally allows an employee who has been denied disability 90 days within which to return to work before deeming the position abandoned. On August 2, 1979, Plaintiff wrote to Jenny Poole, the assistant manager for in-flight service in Atlanta, and stated that she felt she would be able to return to work within 90 days from July 18. In response, Ms. Poole informed Plaintiff that she would need medical certification covering Plaintiff for the full period of absence between July 18, 1979, and the date Ms. Goldstein eventually returned to work. She stated that such medical certification must be submitted "prior to your return to active status." On October 8, Plaintiff again wrote Ms. Poole, and explained that she would not be able to return to work within the 90 day period, which expired on October 18. She then asked whether she needed to submit medical certification, despite

the fact that Ms. Poole had just advised her that it would be necessary to do so.

In light of Plaintiff's dismal attendance record, she was terminated on October 24, 1979. Upon receipt of that letter, Plaintiff contacted Delta and requested "another chance," claiming that she was "disabled." Delta agreed to reinstate her on the condition that she file a claim for long term disability benefits.

Plaintiff received the forms necessary to file for long term disability benefits in early December. However, she delayed filing the request for over three months, finally submitting the claim form in March of 1980. After examining the form, Delta determined that she failed to meet the eligibility requirements for long term disability and her request for these benefits was denied on April 2, 1980. Another 90 day period was then tolled, and Plaintiff returned to active flight status on July 1, 1980, one day before her grace period expired. At that point she had not flown with Delta for more than 18 months.

During July and August, 1980, Plaintiff flew a total of 17 days. Then, because she managed to accrue certain vacation and authorized leave benefits during this time, she took off the entire month of September and the first three weeks of October. She was scheduled to return to work on October 26. She called in sick and never returned.

On October 16, 1980, Plaintiff again filed for full pay sick leave. These benefits expired on January 3, 1981. On January 22, Plaintiff was advised that she must submit medical certification explaining the necessity for her sick leave, or face termination. She filed such certification (a letter from her treating physician) concurrently with an application for short term disability benefits. The short term disability claim was initially granted, but payments were halted after Plaintiff was examined by another physician on behalf of Delta, Dr. Dennis, who concluded that there was no reason why Plaintiff could not return to her customary job.

In February, the in-flight service department determined that because of her poor dependability, Plaintiff should be given a ground position.[2] She was offered a ground position and declined it. Soon afterwards, she was asked for her resignation, and refused to resign. She was ultimately terminated on March 20, 1981.

Plaintiff claims that Delta's conduct violated §510 and §511 of ERISA. Section 511 makes it unlawful for any person to interfere with or prevent the exercise of any right that an employee may be entitled to under ERISA. However, the law is clear that this provision does not provide a private right of action Phillips v. Amoco Oil Company, 614 F. Supp. 694 (N.D. Ala. 1985), aff'd, 799 F.2d 1464 (11th Cir. 1986). Thus Defendant is entitled to summary judgment on this claim.

Plaintiff also claims that Delta's conduct violated §510 of ERISA, which makes it unlawful for any person to discharge, discipline or discriminate against an ERISA plan beneficiary for exercising those rights to which the employee is entitled under the provisions of an employee benefit plan. It is clear that Plaintiff has completely failed to provide any evidence in support of this claim. In a case under §510 of ERISA, a plaintiff must demonstrate that the loss of benefits was not simply a consequence of her termination; the plaintiff must show that the employer intended to deprive the employee of ERISA benefits, and that this intent was a motivating factor behind the termination. Titsch v. Reliance Group, Inc., 548 F. Supp. 983 (S.D.N.Y. 1982) aff'd, 742 F.2d 1441 (2d Cir. 1983). A mere subjective belief that the termination was related to an ERISA claim is not enough to defeat summary judgment. Serb v. Gagnier Products Company Pension Plan and Trust, 658 F. Supp. 6 (E.D. Mich. 1986). It is obvious that Delta fired Ms. Goldstein because she was an undependable employee, and Ms. Goldstein has provided no evidence to the contrary.

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2 Federal regulations requiring minimum number of flight attendants on each flight, and Plaintiff's chronic absenteeism required that Delta find replacements for her. It should be noted that the Disability Plan administrators who denied her claim are not the same people who were responsible for the decision to terminate Plaintiff.

The only argument which Plaintiff presents in support of her claim is the assertion that Delta had 'decided" to fire her before she was examined by Dr. Dennis (who concluded that she was perfectly capable of working). She bases this claim on the fact that her termination letter informed her that all short term benefits would be stopped as of February 19, 1981, the date of her first scheduled appointment with Dr. Dennis, rather than as of February 27, 1981, the date on which she actually saw Dr. Dennis. This is absurd. It is obvious that Delta retroactively decided to make February 19 the cut-off date for short term disability benefits for administrative reasons. Given that Ms. Goldstein was not eligible for any short term disability, Delta could just as easily have cut off her disability benefits as of January 4, 1981, the day her sick leave expired. At any rate the six day disparity in in dates in no way suggests that Delta was trying to deprive Ms. Goldstein of benefits, or retaliate against her for trying to claim benefits. [3]

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[3] Plaintiff also argues that Delta violated ERISA by not giving her another 90 days to return to work after she was denied short term disability. However, Plaintiff never demonstrates that Delta's policy of considering a position abandoned after 90 days is in any way connected to an ERISA-related benefit, nor that Delta terminated her prior to 90 days after February 27 because it intended to deprive her of ERISA plan benefits.

Finally, Plaintiff claims that she was discharged by Delta in order to interfere with her ability to obtain early retirement benefits at age 52 instead of age 55. Apparently on January 1, 1981, the Delta Family Retirement Plan was amended to allow early retirement at age 52 instead of age 55, provided that the employee was employed by Delta on June 1, 1981. Ms. Goldstein has certain vested retirement benefits, which she will receive at age 55. She will not receive them at age 52 because she was not employed by Delta on June 1, 1981. However, Plaintiff's argument that she was intentionally fired by Delta four months before June 1 for the purpose of depriving her of the benefits of the amendment to the retirement plan is wholly unsupported by anything in the record.

Finally, defendant argues that Plaintiff's claim was barred by the applicable statute of limitations. Given Plaintiff's complete failure to demonstrate any merit to her claim, the court declines to address this issue at this time.

Defendant's motion for summary judgment is GRANTED. The Clerk is DIRECTED to enter final judgment for Defendant.

SO ORDERED, this 4 day of November, 1987.

/s/ ORINDA D. EVANS
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
JUDGMENT IN A CIVIL CASE

LOU C. GOLDSTEIN,

v.

DELTA AIRLINES, INC.,

CASE NUMBER C87-8A

JUDGE ORINDA D. EVANS

☒ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered granting defendant's motion for summary judgment.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed, and that the defendant, DELTA AIRLINES, INC., recover of the plaintiff, LOU C. GOLDSTEIN, costs of this action.

FILED IN THE CLERK'S OFFICE
November 5, 1987
ENTERED ON DOCKET
November 6, 1987
LUTHER D. THOMAS, Clerk

By: /s/ B. D. Hatcher
Deputy Clerk

November 5, 1987
Date

LUTHER D. THOMAS
Clerk

/s/ Barbara D. Hatcher
(By) Deputy Clerk

APPENDIX F

FEDERAL STATUTE INVOLVED

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

29 U.S.C. §1140.

Interference With Rights Protected Under Act

SEC. 510. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

Title I -- Protection of Employee Benefit Rights

Findings and Declaration of Policy

29 U.S.C. §1002.SEC. 3: For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is

maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Delta Family Care Disability and Survivorship Plan

Delta's Family Care Disability and Survivorship Plans, long term and short term, work as follows: An employee who is too ill to work is given a certain number of sick leave days during the year. Once these sick leave days are used up, the employee must apply for short term disability benefits. In order to qualify for short term disability benefits, an employee must be unable to perform his customary occupation. In order to obtain short term disability benefits, the employee must provide a medical certificate indicating that he or she is incapable of performing his or her normal work duties. These short term benefits are generous, but of fixed duration. Short term disability benefits are paid for a period of 26 weeks, including the time an employee received full pay sick leave. As long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status. Once all of an employee's short term disability leave has

been used up, the employee must either return to work or apply for long term disability benefits. In order to obtain long term disability benefits, the employee must provide medical certification proving that he or she is incapable of performing any job. Eligibility for benefits under the Disability and Survivorship Plan is independent from the employment status of the employee. Thus, as long as the alleged disability commenced while the employee was employed, Plan benefits would continue for that period of disability regardless of the employee's employment status.

Delta's Sick Leave of Absence Policy provides for leave without pay for 90 days after benefit denial.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LOU C. GOLDSTEIN,	:	
	:	**CIVIL NO.**
vs.	:	1:87-cv-8-ODE
	:	
DELTA AIRLINES, INC.:		

ORDER

This ERISA action is before the court on Plaintiff's motion to proceed pro se, Plaintiff's pro se motion for reconsideration of this court's order of November 5, 1987; and Plaintiff's motion to strike Defendant's response to her motion for reconsideration.

The motion for reconsideration will be denied. It was untimely filed. Under Local Rule 220-6 for the Northern District of Georgia such a motion must be filed within ten days after entry of the order which the party seeks to have reconsidered. Further, the motion is without merit. Plaintiff has not presented any argument or evidence to disturb the court's conclusion that she totally failed to show she was fired by Defendant in violation of ERISA.

Because Plaintiff filed a notice of appeal, thus divesting this court of jurisdiction on December 7, 1987, the court is without power to review any further motions filed by Plaintiff. Accordingly, the same are denied.

Plaintiff's motion for reconsideration is DENIED; the motion to strike or dismiss Defendant's response to Plaintiff's motion is DENIED; and Plaintiff's motion to proceed pro se is DISMISSED AS MOOT.[1]

SO ORDERED, this 22 day of January, 1988.

/s/ORINDA D. EVANS
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[1] Should Plaintiff wish to proceed pro se on appeal she must follow the appropriate procedures for doing so according to the Rules of the Eleventh Circuit Court of Appeals.